BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY DAVID CADE Claimant	)	
VS.	)	
JE DUNN CONSTRUCTION CO. Respondent	)	Docket No. 1,005,315
AND	)	
BUILDER'S ASSOC. SELF-INS. FUND Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the July 13, 2005 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

At the July 12, 2005 preliminary hearing the respondent agreed claimant had suffered a work-related accident on June 24, 2002, and suffered injuries to his right shoulder, hip and ankle. But respondent denied claimant's right knee complaints were caused by the work-related accident.

The Administrative Law Judge (ALJ) ordered, in part, that respondent provide claimant orthopedic care as recommended by Dr. Salvador J. Mendez. Such recommended treatment was for claimant's right knee.

The respondent requests review of whether the claimant's right knee injury arose out of and in the course of employment with the respondent.

Initially, claimant argues the respondent's appeal should be dismissed because the Board does not have jurisdiction to review this Order For Compensation. Claimant notes the respondent does not deny he suffered accidental injury on June 24, 2002, and the current disagreement is over the nature of medical treatment for that accident. Accordingly, claimant concludes whether the ALJ orders or denies medical treatment is not a jurisdictional issue for appeal to the Board. Claimant further argues the ALJ erred in not

ordering temporary total disability compensation. In the alternative, claimant argues his right knee injury is a natural and probable consequence of his initial injury on June 24, 2002, and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Initially, the claimant argues the respondent's appeal does not raise a jurisdictional issue for an appeal from a preliminary hearing.

"A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."[1] Whether claimant's condition and present need for medical treatment for his right knee is due to the admitted work-related accident gives rise to an issue of whether claimant's current condition arose out of and in the course of employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

Claimant next argues he has met his burden of proof that he is entitled to temporary total disability compensation.

The workers compensation administrative court has limited jurisdiction. Its subject matter jurisdiction is limited to cases involving accidental injury arising out of and in the course of employment. Whether claimant suffered accidental injury and whether the injury arose out of and in the course of employment are, therefore, designated in K.S.A. 44-534a, as jurisdictional issues. Personal jurisdiction requires notice and timely written claim. Notice and written claim are also designated as jurisdictional issues under K.S.A. 44-534a. Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation is not a question that goes to the jurisdiction of the ALJ. K.S.A. 44-534a specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. Therefore, the ALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

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[1] K.S.A. 44-534a(a)(2).

> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

It is undisputed that on June 24, 2002, claimant was on a roof laying brick when he stood up and fell into the scaffold; then against the safety rail and then 20 feet to the ground. The parties stipulated that claimant had injured his right shoulder, hip and ankle. Claimant suffered fractures of the shoulder, right hip and ankle. He testified that after his second ankle surgery he began having problems with his right knee. Claimant discussed his knee problems with Dr. Greg Horton who determined the claimant's right leg was a half inch shorter than the left leg. Dr. Horton prescribed an orthotic for claimant's right shoe.

Claimant was released from both Drs. Horton and E. Bruce Toby's medical treatment in December 2003. In a February 27, 2004 examination of claimant, Dr. Koprivica noted claimant complained of right knee pain with sitting and some loss of range of motion of the right knee.[2] As the right knee pain increased the claimant requested additional treatment in approximately September 2004.[3]

The parties entered an Agreed Order, dated December 2, 2004 which provided, in part, that respondent would designate an orthopedic surgeon to provide medical treatment, as necessary, for claimant's work-related injury. On January 6, 2005, claimant was examined and evaluated by Dr. Mendez. The claimant complained of right knee pain which the doctor noted might be indirectly related to the problems claimant had with his right hip and ankle. The doctor advised claimant to give his knee some time to see if the problem resolved. In April 2005, claimant saw Dr. Mendez again and noted that the right knee had continued to give him problems. The doctor recommended an MRI be performed on the claimant's right knee. In a letter to claimant's attorney, Dr. Mendez opined that claimant's right knee complaints were directly related to the June 2002 accident. The doctor attributed the delay in right knee complaints to the fact that the other injuries were more significant and it was not until claimant resumed weight bearing that his knee started to bother him.

At claimant's attorney's request, Dr. Michael J. Poppa reviewed the claimant's medical records and in a letter dated June 29, 2005, opined that claimant's right knee complaints were caused by his June 2002 accident. The doctor noted the accident itself was sufficient to have caused the right knee injury and it was not until claimant began active ambulation with an altered gait that the right knee became more symptomatic.

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[2] P.H. Trans., (July 12, 2005) Resp. Ex. C.

[3] *Id.*, Cl. Ex. 2.

> My opinions take into consideration several factors including the mechanism of injury which was sufficient to cause his right knee injury. In addition, I believe it is reasonable from a medical standpoint to assume that as a result of Mr. Cade's significant traumatic injuries which he sustained as a result of his work injury which relegated him to a non-weight bearing status for a prolonged period of time, that it was not until he began active ambulation with an altered gait, that his work related right knee became increasingly more symptomatic to the point he requires definitive treatment.
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> Medical records from Dr. Koprivica indicate Mr. Cade experienced right knee pain complaints at the time of his evaluation on 2/27/04. The physical examination on that date did reveal evidence of decreased right calf circumference, decreased range of motion involving his right knee, and decreased strength secondary to his knee injury. This certainly pre-dates his knee pain to any outside activities such as occasional golfing in October 2004, where Mr. Cade extensively used a golf cart and participated under the auspices of his treating physician.[4]

Claimant testified that he did not have any problems with his right knee before the fall on June 24, 2002.

> Q. Now, among other things it's been argued that your knee wasn't hurt as a result of the June 24, 2002, accident or a direct and natural consequence of that accident, in other words, due to your altered gait or your shorter leg, things like that. There's no other way that you can think of that you hurt your right knee, is there?
>
> A. No.[5]
>
> Q. Did you ever hurt your knee golfing?
>
> A. No.
>
> Q. Did you ever hurt any part of your body golfing?
>
> A. No.
>
> Q. When you were having -- when you first began golfing in October 2004 again with Dr. Toby's blessing, you had already been having the knee problems?
>
> A. Yes.
>
> Q. And we had already sent a letter requesting care for that --

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[4] *Id.*, Cl. Ex. 5.

[5] *Id.* at 20-21.

A. On my knee?

Q. -- orthopedic care?

A. Yes, yes.

Q. And in fact, before you were released by Dr. Horton, you are certain that you had discussed with him that you had right knee pain that you noticed?

A. Yes.[6]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[7], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[8], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[9], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

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[6] *Id.* at 22.

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[9] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[10], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's Order.

WHEREFORE, it is the finding of the Board that the Order For Compensation of Administrative Law Judge Brad E. Avery dated July 13, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2005.

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BOARD MEMBER

c: Donald J. Fritschie, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).